IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 349

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
Petitioner,

vs.

UNITED AIR LINES, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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Summary of Argument.

I. 1. The rule stated by Respondent that where a foreign action is opposed to local policy, such action will not be enforced, is a general rule in the field of conflicts. It is subject to the Full Faith and Credit Clause of the Constitution. Its applicability to cases where that clause is involved may be classified as follows: (a) those where the local policy must yield to the national policy expressed by that clause; (b) cases where the local policy is paramount to the national policy, because within the State's inherent authority to regulate matters concerning health, safety, morals and welfare; (c) where foreign penal or revenue laws are involved; and (d) where the Federal policy would not compel recognition of the foreign action, but it is entertained, nevertheless, as a matter of comity 1-3

2. Respondent asserts that the instant statute expresses a local policy against only certain foreign death actions; and that such policy is paramount to the national policy. It adopts the reasoning of the Court below that since the Illinois Bar is only qualified, whereas the Wisconsin bar was absolute, the Illinois bar is justified under Section 1 of

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I.

The Proviso to Section 2 of the Illinois Injuries Act Is Counter to the Full Faith and Credit Clause, Section 1, Article IV of the Constitution of the United States.

1. Respondent first argues (pp. 5-7, Brief for Respondent) that where a foreign action is opposed to local policy, such action will not be enforced. This is a general rule in the field of conflicts. Stated differently, comity will not be granted to a foreign action if it transgresses local policy. The general rule is, of course, subject to the Full Faith

and Credit Clause. Its applicability where that clause is involved may be classified as follows:

(a) Cases where local policy must yield to the national policy embodied in the Full Faith and Credit Clause.[1] Formerly, it was thought that excluded from this area were instances where local courts possessed of general jurisdiction were, by statute, divested of power in certain cases,[2] but this concept has been annihilated by the later decisions.[3]

(b) Cases where local policy is paramount to the national policy[4] embodied in the Full Faith and Credit Clause, because recognition of the foreign action would destroy the State's essential right of sovereignty,[5] *i. e.*, interfere with exercise of its reserved police powers,[6] or "exhibit to the citizens of the state an example pernicious and detestable."[7]

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1. *Hughes* v. *Fetter*, 341 U. S. 609, 612; *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 279; *Converse* v. *Hamilton*, 224 U. S. 243; *Broderick* v. *Rosner*, 294 U. S. 629, 643, 647.

2. *Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 373, 374; *Fauntleroy* v. *Lum*, 210 U. S. 230; *Converse* v. *Hamilton*, 224 U. S. 243, 261.

3. *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Broderick* v. *Rosner*, 294 U. S. 629, 643, 647; *Angel* v. *Bullington*, 330 U. S. 183, 188, 189; *Hughes* v. *Fetter*, 341 U. S. 609, 612.

4. In the workmen's compensation cases, where one employed or domiciled in one state is injured in another, and the contest is as to which of the two actions shall apply, the Court has talked of competing State policies between which the Court must choose under Section 1 of Article IV. *Alaska Packers* v. *Industrial Comm'n*, 294 U. S. 532; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145. But where a tort action arises by reason of the statute where the wrongful act occurs, and the one wronged asserts the cause of action in another forum, which has a policy opposed to the action, it is more accurate to state that the competing policies are that of the forum and of the national policy expressed in Section 1 of Article IV. *Hughes* v. *Fetter*, 341 U. S. 611, 612.

5. *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 209, 210.

6. *Griffin* v. *McCoach*, 313 U. S. 498, 506; *Andrews* v. *Andrews*, 188 U. S. 15, 30-32.

7. *Universal Adj. Corp.* v. *Midland Bank*, 281 Mass. 303, 184 N. E. 152; 87 A. L. R. 1407, 1416.

(c) Cases for the enforcement of a foreign penal law. In these the foreign law is so localized in character that the forum in another State is held to have no power to entertain it.[8] Into either this, or the preceding category, fall cases where the revenue laws of one State are attempted to be enforced in another. Either such laws can have no extra-territorial recognition,[9] or they are denied comity because to adjudicate or construe them might cause the forum embarrassment in its relationship with the sister State. The question is open in this Court as to whether their recognition is compelled under Section 1 of Article IV.[10]

(d) Cases where the Full Faith and Credit Clause would not compel recognition of the foreign action, but where the foreign action is, nevertheless, entertained locally as a matter of comity.[11]

2. Respondent then goes on to assert that the proviso to Section 2 of the Illinois Injuries Act expresses a local policy against only *certain* foreign death actions, *i. e.*, those where process can be served where the action arose,—which local policy, Respondent contends, is paramount to the national policy expressed by the Full Faith and Credit Clause.

It adopts the plausible reasoning of the Court of Appeals below that since the Illinois bar is only qualified, whereas the Wisconsin bar was absolute, Illinois does not permit herself to become an asylum for a defendant who cannot be found where the action arose. Therefore, it is argued, since the Illinois bar does not impose as harsh or rigid a barrier as that imposed by Wisconsin, the

8. *Huntington* v. *Attril*, 146 U. S. 657, 672-675; see also *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 275.

9. *Moore* v. *Mitchell*, 281 U. S. 18, 24.

10. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275.

11. *Milwaukee Co.* v. *White Co.*, 296 U. S. 268, 275.

qualified bar is justified under Full Faith and Credit, even though the Wisconsin bar is not.

Plausible as that argument may seem, it will not bear the scrutiny of sound reason. Illinois' policy against foreign actions for wrongful death is even weaker than that of Wisconsin. Not only has Illinois created such actions and permits them access to her courts, but also she recognizes like actions arising under foreign laws if process cannot be served where they arose. This indicates an even weaker policy against foreign wrongful death actions, as such, than does the Wisconsin statute,—or, in fact, no policy at all!

Illinois has not based its bar to the foreign action on the ground that she prefers an action created by herself, designed to protect her own citizens, as in *Alaska Packers v. Industrial Com'n*, 294 U. S. 532[12]; that it violates her reserved police powers, as in *Andrews* v. *Andrews*, 188 U. S. 15, 30-32, and *Griffin* v. *McCoach*, 313 U. S. 498, 506; or that the foreign action exhibits to her citizens "an example pernicious and detestable."

None of these, or like, justifications is available in support of the Illinois bar. The only ones are:

(a) "to regulate and reduce the case load of the Illinois courts" (Brief for Respondent, p. 9; 190 F. 2d 495); and (b), "a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts . . ." (190 F. 2d 495; Brief for Respondent, pp. 8-10).

(a) (i) We submit the first of these runs squarely counter to the Full Faith and Credit Clause. The purpose of that provision of the Constitution was to alter the status of the several States as independent foreign sovereignties, free to ignore the laws of the others, and to make them integral

12. Compare *Bradford Electric* v. *Clapper*, 286 U. S. 145.

parts of a single Nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the State of its origin. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 277.

That provision "abolished in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity." *Broderick* v. *Rosner*, 294 U. S. 629, 643. A State "cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent". *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Broderick* v. *Rosner*, 294 U. S. 629, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

Is not the principle to be clearly drawn from these decisions that the sovereignty of each State was curtailed to prevent withdrawal of jurisdiction from courts of general jurisdiction, unless based on other considerations of internal government,—health, safety, morals, welfare,—and that States are powerless to remove or deny such jurisdiction, unless justified by such other considerations? We submit that such principle is clearly indicated, and that a State may not, simply because it does not want its courts burdened, shut off access to actions created by public laws of sister States.

If the fact that process may be served elsewhere is alone justification under the Full Faith and Credit Clause to deny access to courts, then every State could circumvent the Full Faith and Credit Clause in every instance where a carrier, or any other multi-State enterprise, was defendant, not to protect its own health, safety, morals or welfare, but simply to push off onto another State the burden of adjudging the controversy. It was precisely this that Section 1 of Article IV was designed to prevent.

(ii) Finally, another and a clinching answer to the argument that reducing the local case load provides justification

under the Full Faith and Credit Clause *is that once a judgment is obtained, an action on the judgment must be entertained, irrespective of the local statute.*[13] Thus, if respondent's argument were to prevail in many, if not in most, instances the courts of the forum will be burdened, irrespective, since ordinarily suitors sue where their claims can be collected; and if they are compelled to sue elsewhere, but cannot collect there, they will sue on the judgment where the assets are located. And thus two suits are required, the courts of two States burdened, where those of only one should be.

(h) The Court of Appeals below (190 F. 2d 495) and Respondent (Brief for Respondent, pp. 8-10) seek to borrow from the doctrine of *forum non conveniens* in the Federal courts in justification of the statute here.

(i) The considerations for the instant statute are almost entirely unlike those bringing that doctrine into play. *Forum non conveniens* is a discretionary rule, applied by giving weight in each case to many factors, and "it can never apply if there is absence of jurisdiction."[14] The statute here sterilizes jurisdiction if the origin of the action is foreign and process may be served where the action arose.

The factors to be considered in the application of *forum non conveniens* are at least eight in number.[15] The most important of these is the private interest of the plaintiff, and generally, the action must lie where he has chosen to bring it, *especially if in the forum of his residence or citizen-*

13. *Kenney* v. *Supreme Lodge*, 252 U. S. 411; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275, 276.

14. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508, 504.

15. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508; Annotation, 93 L. ed. 1220, enumerating those factors from *Gulf Oil*. Those not enumerated in the Annotation are: 7. Foreign origin of the action, and, 8. Whether the claim is collectible in the foreign State where it arose.

ship.[16] *The only one of these factors considered in the statute here is the foreign origin of the action! The most important one, private interest of the plaintiff, particularly where he is a citizen and resident of the forum, is ignored!* Here Nelson was a citizen and resident of Illinois; his executor is likewise; so, also, are his widow and children for whom recovery is sought!

Access to sources of proof, availability of witnesses and the cost of obtaining their attendance usually have relationship with the proximity of the place of trial to that where the action arose. The instant statute imposes the jurisdictional bar whether the action arises in Hammond, Indiana,[17] adjacent to Illinois' border, Davenport, Iowa, across the Mississippi from Illinois, in Kentucky, across the Ohio from Cairo, Illinois, or whether it arises in San Diego, California, Bangor, Maine, Key West, Florida, or Seattle, Washington. It is apparent that no consideration is given by the statute to the factors having to do with availability of proof.

In the case at bar, everyone aboard the airplane was killed. *Res ipsa loquitur* applies to negligence.[18] If proof of negligence should become an issue, it must be furnished by experts. They are more readily available in Chicago, than in Salt Lake City; and cost of producing them in Chicago would be less. Proof of damages is available only in Chicago. Respondent's principal office is in Chicago, so its ease of producing witnesses there cannot be gainsaid.

Other factors to be weighed in applying the doctrine are

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16. *Koster* v. *Lumbermen's Mutual Cas. Co.*, 330 U. S. 518, 524; *Gregonis* v. *Philadelphia & Reading*, 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1, 5; *Universal Adj. Corp.* v. *Midland Bank*, 281 Mass. 303, 184 N. E. 152, 87 A. L. R. 1407, 1414.

17. See *Crane* v. *Chicago & W. I. R. Co.*, 233 Ill. 259, where the injury occurred in Illinois, but the death occurred in Hammond, Indiana.

18. Cases collected in *Smith* v. *Penn Central Airlines*, 76 F. Sup. 940.

absent here and given no consideration by the statute. As to view, if view is necessary, the Civil Aeronautics Authority has plenty of photographs. James Nelson was at the scene within a matter of hours to identify his father's body. He lives in a Chicago suburb. The action created by Utah law is substantially similar to that created by Illinois, so the practical problems, in either forum, are alike. As to enforceability, Illinois is the logical place to bring suit, since it is in Chicago that Respondent has its principal place of business, and, presumably has most of its assets.

(ii) *Forum non conveniens* is a doctrine which applies to all forms of action, although the factors to be considered in its application may well be given different weight in different actions.[19] The statute here singles out only one type of action. If there are considerations similar "to those responsible for the application of the doctrine", which justify the statute under the Full Faith and Credit Clause, then would not the discrimination against those vested with actions for wrongful death, while all other actions are permitted, be violative of the privileges and immunities, the equal protection clauses, and even the due process clause, of the Fourteenth Amendment?[20]

(iii) This Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504, has said: "Indeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."[21] Here Respondent bases most of

19. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504; *Koster* v. *Lumbermen's Mutual Cas. Co.*, 330 U. S. 518, 521, 528; *U. S.* v. *National City Lines*, 337 U. S. 78.

20. See *Gregonis* v. *Philadelphia & Reading, C & I Co.*, 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1, 5.

21. We by no means seek to wrench this expression from its context, and attribute to it a meaning broader than its context justifies. What we think it means is that the orbit of the doctrine is narrower than of lack of jurisdiction or mistake of venue. If jurisdiction exists and venue is proper, even so, the doctrine may come into play. If they do not exist, there is no need for application of the doctrine.

its case on its contention that the statute divests jurisdiction of the local courts, and under *Erie* v. *Tompkins*, likewise divests jurisdiction of the Federal Court (Brief for Respondent, pp. 10, 11, 13, 14-16). It now claims the statute is justified under the Full Faith and Credit Clause on considerations "responsible for the application of the doctrine of *forum non conveniens* in the federal courts * * *" (Brief for Respondent, pp. 8, 9). Thus, it invokes a doctrine which is discretionary and which cannot come into play unless jurisdiction exists, to justify the *destruction of jurisdiction!*

II.

The Proviso to Section 2 of the Illinois Injuries Act Cannot Deprive the Federal Court of Jurisdiction Under the Principle of Erie v. Tompkins.

A. Such Construction Would Violate Article III of the Constitution of the United States.

1. Respondent quotes from the opinion of the Court below in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 644, to refute our contention that to permit State action in any way to impair or cut down Federal jurisdiction would be violative of Article III (Brief for Respondent, pp. 10, 11).

Is not the language quoted judicial legislation?

The basis for the majority decision in *Erie* v. *Tompkins*, 304 U. S. 64, was that the right to expound law, not involving Federal questions, was reserved to the States and not granted by Article III. Certainly the statute creating jurisdiction in diversity cases (28 U. S. C. A. 1332) was clearly authorized by Article III. The concurring opinion by Mr. Justice Reed, 304 U. S. 90-92, was grounded on the premise that the "rules of decision" statute, 28 U. S. C. A.

1652, could properly bear the construction that Federal courts were bound to apply not only local statute law, but case law as well. Nothing was said there about the statute creating jurisdiction in diversity cases.

We cannot recall any instance, and certainly Respondent has cited none, where among the numerous progeny of *Erie* v. *Tompkins*, this Court has cited the statute conferring jurisdiction in diversity cases (28 U. S. C. A. 1332) and held that the jurisdiction so conferred could be cut off or impaired by State action.

There have been those, impressed with the injustice of the *Black and White*[22] and other cases which led to the decision in *Erie* v. *Tompkins*, who have advocated the repeal of the statute conferring jurisdiction in diversity cases. If that is to be done, in whole or in part, needless to say it must be accomplished by Congress, and not by the Courts.

2. We do not deem it necessary to reply to Respondent's citation of *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234. Anyone with a cursory knowledge of the law, knows that Congress may not legislate except within the purview of its granted powers.

3. Respondent's answer (p. 11) to our assertion that *the determination* as to whether Federal jurisdiction may be curtailed by a local statute itself presents a Federal question to which the principle of *Erie* v. *Tompkins* cannot apply, is simply that *Erie* v. *Tompkins does* apply, and that the local statute *does* bar jurisdiction of the Federal Court. Thus the issue is firmly joined on this contention. We are content with the exposition in our Brief in Support (pp. 23, 24).

4. Respondent (p. 11) asserts that we argue that the principle of *Erie* v. *Tompkins* could never result "in the law of the forum closing the federal courts" because every

22. 276 U. S. 518.

question would be a Federal question under Article III. *Insofar as the power to hear and determine the controversy is concerned,* this is precisely correct. *No State action can ever cut off or curtail that power,* because it is conferred by Congress under the *grant of power* in Article III. But local statutes *can supply defenses* to actions in the Federal courts. There is a well-recognized distinction between the two, analogous to organic disability to even consider the controversy, on the one hand, and as to what rule of comity should be applied, on the other. The former goes to *power,* the latter to *duty.* Since under our dual system of government, State action cannot divest jurisdiction of Federal courts, and, *organically, they are possessed of power* to determine controversies between citizens of different States, the rules by which they determine those controversies where conflicts of law are involved by borrowing the policy of the State in which they are sitting, are rules imposed by judicial opinion. These go to the *merits,* not to *jurisdiction.*[23]

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23. "The objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes *is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction, but to the merits,* and raises a question which district courts are competent to decide. * * * *That defense is without merit if full faith and credit must be given the judgment"* (Italics ours). *Milwaukee County* v. *White Co.,* 296 U. S. 268, 275.

"There is a marked distinction between limitations arising from *organic* or *statutory* provisions concerning jurisdiction on one hand, and limitations imposed by judicial opinion under rules of comity on the other. Concerning jurisdiction of the subject matter, it is said: 'Such jurisdiction the court acquires by the acts of its creation, and possesses inherently by its constitution'." 21 C. J. S., Courts, § 35, p. 45.

"Judicially imposed limitations may better be classed as refusals to exercise jurisdiction rather than denials of its existence. As said by Judge Cardozo: 'The sovereign in its discretion may refuse its aid to the foreign right. *St. Louis, I. M. & So. R. R. Co.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616, 52 L. ed. 1061; *Dougherty* v. *American McKenna Process Co.,* 255 Ill. 369, 99 N. E. 619, L. R. A.

B. The Progeny of Erie v. Tompkins Do Not Justify Any Such Conclusion.

There is not much point in further arguing with Respondent in its answer (Brief of Respondent, pp. 12-14) to this subdivision of our original Brief in Support of our Petition (pp. 24-30).

Respondent, here, as in II.A.3. above, has squarely joined issue. And we are again content with the exposition in our original Brief, except to point out the following:

1. Respondent, by arguing that "considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts" provide justification for the challenged statute under the Full Faith and Credit Clause (Brief of Respondent, pp. 8-10), has *positively conceded* that the statute here is *procedural,* and, therefore, not binding on the Federal courts under the doctrine of *Erie* v. *Tompkins.*

This Court in *Missouri* v. *Mayfield,* 341 U. S. 1, 5, has indicated that each State may assert its own "*procedural policy*" as to the doctrine *forum non conveniens.* The Court there further said, "If denial of a motion to dismiss an action under the * * * [F.E.L.A.] is rested on such a *general*[24] *local practice,* no federal issue comes into play".

1915 F. 955, Ann. Cas. 1913 d, 568. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. *But that, of course, is a false view. Loucks* v. *Standard Oil Co., supra.*'" (Italics ours.) *Bowles* v. *Barde Steel Co.,* 177 Oregon 421, 448, 162 A. L. R. 328, 344, 164 Pac. 2d 692, 703, 704.

See also *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 111, 120 N. E. 198, 202.

24. Illinois has no such "*general* local practice". The instant statute singles out foreign wrongful death actions, and denies recourse to them alone. If it singled out F. E. L. A. actions, and denied recourse as to them, while recognizing all others, the law would be void. *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230, 233.

(Italics ours.) With the revision of the Judicial Code, Section 1404(a) (28 U. S. C. A. 1404(a)) set forth the rule and policy of *practice and procedure* as to *forum non conveniens* in the Federal courts. *Ex Parte Collett*, 337 U. S. 55, 71. In that case, against the contention that the revision could have no retroactive effect, it was held, 337 U. S. 71:

> "Petitioner suggests that his action may not be transferred because it was instituted prior to the effective date of the Code. Clearly § 1404(a) is a *remedial provision*, applicable to pending actions. And no one has a vested right in *any given mode of procedure*. . . . *Crane* v. *Hahlo*, 258 U. S. 142, 147." (Italics ours.)

The States may have their own rules and policy as to *forum non conveniens*. They are strictly matters of practice and procedure. The Federal government has expressed its rule and policy on the same subject. *Forum non conveniens* is procedural and the new code so treats it. *United States* v. *National City Lines*, 337 U. S. 78, 80-84; Moore's Commentary on the U. S. Judicial Code, p. 331, n. 87. Being matters of practice and procedure, they are within the grant of judicial power conferred by Article III, and, therefore, unaffected by the doctrine of *Erie* v. *Tompkins*. Obviously, any State rule on this subject can in no way affect the Federal courts.

2. In addition to the reasons we have given in Point II. B. 3. of our Original Brief (pp. 28-30), it is apparent that the Court of Appeals below reached its erroneous conclusion on the jurisdictional question here, because of its failure to appreciate that the doctrine of *forum non conveniens*, on which it relies to sustain the instant statute under the Full Faith and Credit Clause (190 F. 2d 495), states a rule of *practice and procedure*, and not one of *substantive law* which would be binding on the Federal

courts under the principle of *Erie* v. *Tompkins*. And it is to be noted that the Court below felt that the local statute expressed a rule of *forum non conveniens*, even when the Full Faith and Credit question was not even raised. *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d, 640, 646. Brief for Respondent, p. 15.

III.

The District Court Below Had Power Under 28 U. S. C. A. 1406 (a) to Transfer This Case to the Federal Court in Utah.

The alternative motion to transfer is important here only if certain other conclusions are reached by the Court.

It is unimportant if: (a) The Illinois statute is held counter to Section 1 of Article IV; (b) the Illinois statute is held to violate Section 13 of Article IV of the Illinois Constitution; (c) the Illinois statute is sustained under the above Constitutional provisions, but it is held (i) that it *cannot* divest Federal Jurisdiction, *and* (ii) *does not* supply a defense on the merits.

It is vital only if the Illinois statute is sustained under the above Constitutional provisions, both Federal and State, *and* (i) has the effect to divest Federal Jurisdiction, *or* (ii) supplies a defense to the Utah action on the merits.

The argument in our Original Brief (pp. 30-33) amply meets that of Respondent (Brief for Respondent, pp. 14-17).

IV.

The Proviso to Section 2 of the Illinois Injuries Act Contravenes Section 13 of Article IV of the Illinois Constitution of 1870.

1. Respondent asserts that this Court should not consider the Illinois constitutional question raised here, because of the decisions of the highest Court of the State upholding the statute (Brief for Respondent, pp. 15, 16). Those decisions have all been nullified by *Hughes* v. *Fetter*, 341 U. S. 609.

2. In *Michigan Central Railroad* v. *Powers*, 201 U. S. 245, 291, cited by Respondent, this Court held:

> "Undoubtedly a Federal Court has the jurisdiction, and when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and state Constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination."

In a later case, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 187, 188, an attack was launched upon a State license tax on the generation of electricity. Federal, as well as State, constitutional questions were raised. This Court undertook to dispose of all of the questions raised in that case, whether State or Federal, and expressly passed upon a State constitutional question similar to that raised by Petitioner here.

3. *Michaels* v. *Hill*, 328 Ill. 11, cited by Respondent on the merits of this question, upholds *Petitioner's* contention, rather than that of *Respondent*. An act amendatory of an act entitled "An Act concerning the levy and extension of taxes" was involved. The amendatory act

bore the title: "An Act to amend the title and Section 2 of an act entitled 'An Act concerning the levy and extension of taxes', approved May 9, 1901, in force July 1, 1901, as amended; and to add a new Section thereto to be known as Section 3."

The original Section 2 was amended, but the changes were made in subjects originally embodied in that section. Section 3 was added to the original act, containing an entirely new subject, namely, providing a limitation of indebtedness in counties having a population of less than 500,000 and in cities, townships, school districts and other municipal corporations having a population of less than 300,000. Lastly, the title of the original act was amended to read as follows: "An Act concerning the levy and extension of taxes, and also providing for a limitation of indebtedness in counties having a population of less than 500,000 and in cities, townships, school districts, and other municipal corporations having a population of less than 300,000."

The Court held that Section 3, which was added by the amendatory act, had to do with the power of municipalities to incur indebtedness, a matter wholly independent of and having nothing to do with, the levy and extension of taxes; that limitation of indebtedness was a matter affecting the municipality, and one with which the County Clerk, in the levy and extension of taxes, had no concern. It was there held (p. 19):

> "It seems beyond the realm of debate that the power of a municipality to incur indebtedness is not within or related to the subject of the duties of the County Clerk in the extension or scaling of taxes. While the two subjects are related to the general subject of revenue, they bear no relation to each other."

The amendatory act was held to be wholly invalid because in conflict with Section 13 of Article IV.

Here, the creation of an action for wrongful death, and a provision that jurisdiction of local courts are denied to foreign actions for wrongful death, may well both be related to the subject of wrongful death. But it is apparent that an act "requiring compensation" for wrongful death is not related to an act which divests the jurisdiction of courts to hear or entertain actions created by the laws of sister States.

Conclusion.

For the reasons set forth above, and in our Original Brief in Support of the Petition herein, we respectfully request that the decisions below be reversed.

Respectfully submitted,

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